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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-730

HAROLD REED HOKE, M.D.,
Respondent

v.

RETAIL CREDIT CORPORATION,
GEORGE JACKINS and FRANK GARRIS,
Petitioners

To the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	2
A. Basic facts	2
B. Proceedings in the District Court	4
C. Proceedings in the Court of Appeals	5
Reasons for Granting the Writ	6
A. The determination of the Court of Appeals that the report in question was intended for use in "employment purposes" is contrary to the plain language of the FCRA as well as the spirit and intent of the FCRA	7
B. The holding of the Court of Appeals that § 1681a(d)(3) of the FCRA incorporates only the "general subject matter (but not all specific detail) of § 1681b(3)(D)" contravenes the plain language of the FCRA	12
Conclusion	15
Appendices:	
A. Opinion filed August 19, 1975	A-1
B. Memorandum of Decision filed October 11, 1974	B-1
C. Fair Credit Reporting Act (excerpts)	C-1

TABLE OF AUTHORITIES

CASES: Page

Fernandez v. Retail Credit Company, 349 F.Supp. 652 (E.D. La. 1972) 9, 11
Porter v. Talbot Perkins Children's Services, 355 F. Supp. 174 (S.D.N.Y. 1973) 9
Sizemore v. Bambi Leasing Corporation, 360 F.Supp. 252 (N.D.Ga. 1973) 9, 11
Wrigley v. Dun & Bradstreet, Inc., 375 F.Supp. 969 (N.D.Ga. 1974), aff'd 500 F.2d 1183 (5th Cir. 1974) . 9, 11

STATUTES:

15 U.S.C. § 1681(b) 10
15 U.S.C. § 1681a(d) 4, 6, 8, 11, 12
15 U.S.C. § 1681a(d)(3) 12, 13, 14
15 U.S.C. § 1681a(h) 7
15 U.S.C. § 1681b 4, 12, 13, 14
15 U.S.C. § 1681b(3)(B) 8, 9, 11
15 U.S.C. § 1681b(3)(C) 13
15 U.S.C. § 1681b(3)(D) 4, 5, 12, 13, 14
15 U.S.C. § 1681b(3)(E) 4
15 U.S.C. § 1681f 14

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RETAIL CREDIT CORPORATION,
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To the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Retail Credit Corporation, George Jackins and Frank Garris pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case (No. 74-2358) on August 19, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the order of the District Court has not yet been published but is set forth in Appendix A. The memorandum of

decision of the District Court is unpublished but is set forth in Appendix B.

JURISDICTION

The opinion of the Court of Appeals reversing the order of the District Court was entered August 19, 1975. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This case involves the construction and applicability of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., with respect to a certain investigative-type report prepared by the petitioners concerning the respondent. The specific question presented is: whether the report in question was a "consumer report" within the meaning of the Fair Credit Reporting Act.

STATUTE INVOLVED

1. Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (Relevant excerpts set forth in Appendix C).

STATEMENT OF THE CASE

A. Basic Facts

This is a civil action for damages brought by respondent Harold Reed Hoke, M.D., against Retail Credit Company and two of its employees (hereafter collectively referred to as "Retail Credit" or "Petitioners") alleging violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (hereafter "FCRA").

The complaint alleged in general terms "negligent and malicious promulgation of Consumer Report information" by Retail Credit arising out of a report prepared by Retail Credit on Dr. Hoke. In June of

1971 Dr. Hoke made application to the Texas State Board of Medical Examiners (hereinafter "Texas Board") for a license to practice medicine in the State of Texas. As a routine part of the processing and consideration of this application, the Texas Board requested a report on Dr. Hoke from Retail Credit. The requested report was prepared by Retail Credit and forwarded to the Texas Board in September of 1971.

In August of 1972 Dr. Hoke contacted the Retail Credit office in Rocky Mount, North Carolina, and requested that the contents of the report submitted by Retail Credit to the Texas Board be divulged to him, with which request Retail Credit complied, Dr. Hoke expressed dissatisfaction with this report and consequently a reinvestigation was made and a supplemental report forwarded to the Texas Board in November of 1972. The contents of this report were also divulged to Dr. Hoke.

On December 13, 1972, Dr. Hoke instituted this action seeking damages for alleged negligent and malicious promulgation of consumer report information in violation of the FCRA. Thereafter, in discovery procedures, by deposition Dr. Hoke admitted that there was no purpose in his applying to the Texas Board other than to obtain a license to practice medicine in Texas. His responses to interrogatories established that he had not entered into any contract of employment in Texas subject to his becoming there licensed to practice medicine; that he had not contracted for any medical office space in Texas; and that he had not applied to be employed by the Texas Board. An affidavit and supplementary affidavit from the secretary of the Texas Board established that the Texas Board was not required by law to consider the financial re-

sponsibility or financial status of an applicant for a license to practice medicine although there was a legal requirement for consideration of the professional status of applicants, i.e., their moral character, reputation and competence to practice medicine.

In reliance upon the deposition of Dr. Hoke, his responses to interrogatories, and the affidavit of the secretary of the Texas Board, on March 28, 1974, Retail Credit filed a motion for summary judgment dismissing the action on the ground that the report submitted by Retail Credit to the Texas Board was not a "consumer report" and therefore was not within the ambit of the FCRA with the result that the court was without jurisdiction.

B. Proceedings in the District Court

Upon motion of Retail Credit for summary judgment, the District Court dismissed the complaint, holding that the report sued upon was not a "consumer report" within the meaning of the FCRA and that the court was therefore without jurisdiction of the subject matter.

The opinion of the District Court turned upon its view that the report in question could be properly defined as a "consumer report" under § 1681a(d) of the FCRA only if it was intended for one of the purposes set forth in § 1681b, only two of which the court determined could possibly apply under the facts of the case: § 1681b(3)(D)—use of the report in connection with a determination of eligibility for a license "granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status", or, § 1681b(3)(E)—use of the report by a person having a "legitimate business need for the in-

formation in connection with a business transaction involving the consumer."

In light of the affidavits of the secretary of the Texas Board to the effect that there was no legal requirement for the Board to consider the financial responsibility or status of applicants for medical licenses, the court concluded that § 1681b(3)(D) was not applicable. The court likewise concluded that § 1681b(3)(E) was not applicable because the Texas Board had no business need or objective for the report in question. Lacking either of these bases for the finding of a "consumer report," the court ordered the complaint dismissed.

C. Proceedings in the Court of Appeals

Upon appeal by Dr. Hoke, the United States Court of Appeals for the Fourth Circuit reversed the order of dismissal entered by the District Court and remanded the case to the District Court. The Court of Appeals specifically held that the report in question was a "consumer report."

Applying what it termed the "broad generic sense of the words," the Court of Appeals held the report in question to have been intended for use in establishing Dr. Hoke's eligibility for "employment purposes" and thus a "consumer report." The court concluded that the practice of medicine involved "employment" on the part of a physician. Since the license sought by Dr. Hoke was an absolute prerequisite to his entering upon the practice of medicine in Texas and since the report prepared by Retail Credit related to the question of whether the license would be granted, the court concluded that the report was for "employment purposes." The court cited no authority in arriving at this conclusion.

As a second basis for finding the report in question to be a "consumer report" the Court of Appeals reasoned that § 1681a(d) of the FCRA did not incorporate all of the language contained in § 1681b(3)(D) with the result that the portion of § 1681b(3)(D) concerning the legal requirements of a governmental license-granting agency to consider the financial responsibility or status of applicants might be ignored in the determination of whether a report was a "consumer report." The court therefore concluded that simple consideration of the report in question as a factor in determining Dr. Hoke's eligibility for a license to practice medicine was enough to render the report a "consumer report."

REASONS FOR GRANTING THE WRIT

This case presents the important issue of the scope and applicability of the FCRA to the situation of a professional person applying to a state licensing agency for a license to engage in his profession. This is an important question of federal law which has not been, but should be, settled by this Court inasmuch as the outcome of this case will directly affect the way in which professional licensing boards throughout the country screen applicants for medical, legal and other professional licenses. Additionally, this question requires an authoritative decision from this Court in order that the overall scope of the FCRA may be delineated more clearly so that the credit reporting industry and the myriad commercial enterprises which rely upon this industry may move forward with certainty. Finally, the action of this Court is needed in its Supervisory role over the lower federal courts because of the magnitude of the departure of the Court of Appeals from the accepted and usual course of judicial proceedings.

A. The Determination of the Court of Appeals that the Report in Question Was Intended for Use in "Employment Purposes" Is Contrary to the Plain Language of the FCRA as Well as the Spirit and Intent of the FRCA

1. The so-called "broad generic" definition of "employment purposes" contended for by the Court of Appeals contravenes the plain language of the FCRA.

Section 1681a(h) of the FCRA contains the following definition of "employment purposes":

> The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

The Court of Appeals takes the position that the phrase "as an employee" modifies *only* the word "retention" and *not* the words "employment, promotion, reassignment." The court arrives at this conclusion based upon its reasoning that "the words 'employment, promotion, [and] reassignment,' having specific meanings in the area of activities for the production of income, need no modifier. By contrast, 'retention,' a word of varied meanings in varied contexts, does." While such an approach to the language of the statute is ingenious and unquestionably aids the court in arriving at the conclusion which it reached, the petitioners submit that this reasoning is fairly described as strained, that an equally convincing argument can be made contra to the position taken by the Court of Appeals, and that the construction given these words by the court flies in the face of accepted, correct usage of the English language. Such a debatable ground is hardly a proper one for reaching a legal conclusion

with the far-reaching effects of that of the Court of Appeals in this case and represents a departure of such magnitude from the accepted and usual course of judicial proceedings as to call for this Court to exercise its powers of supervision.

2. The construction placed upon the words "employment purposes" by the Court of Appeals is contrary to the spirit and intent of the FCRA.

The Court of Appeals states that "in the context of FCRA the practice of medicine necessarily takes the form of some type of 'employment.'" From this premise the court reasons that because Texas law requires practitioners of medicine to be licensed before they may practice—i.e., become "employed" in the view of the Court of Appeals—and because the report in question was to be used in determining whether a medical license would issue, the report is one intended to be used for "employment purposes" and thus is a "consumer report" under §§ 1681a(d) and 1681b(3)(B) of the FCRA.

The Court of Appeals has apparently considered only the word "employment" and not the words "employment purposes" in arriving at its so-called "broad generic" construction of this portion of the FCRA. Petitioners urge that there is a difference between "employment" in the abstract sense considered by the Court of Appeals and "employment purposes" as used in the FCRA. If something has a "purpose" that purpose, petitioners believe, flows from some entity. The FCRA deals with two classes of persons: those furnishing information and those about whom information is furnished. The "employment purposes" referred to in the FCRA must, it is submitted, flow from one of these classes of persons. And the cases

clearly indicate that it is only the purposes and needs of the persons to whom information is furnished that can trigger the coverage of the FCRA. See, e.g., *Fernandez* v. *Retail Credit Company*, 349 F. Supp. 652 (E.D. La. 1972); *Sizemore* v. *Bambi Leasing Corporation*, 360 F. Supp. 252 (N.D. Ga. 1973); and *Wrigley* v. *Dun & Bradstreet, Inc.*, 375 F.Supp. 969 (N.D. Ga. 1974), aff'd without opinion 500 F.2d 1183 (5th Cir. 1974), all holding that with respect to § 1681b(3)(E) of the FCRA (dealing with the furnishing of information to a person who has "a legitimate business need for the information in connection with a business transaction involving the consumer") it is the needs and objectives of the person to whom information is furnished that will bring the FCRA into play and not the needs and objectives of the person about whom the information is furnished.

Petitions believe that consistency of application requires that a consideration of the words "employment purposes" in § 1681b(3)(B) necessarily means the "employment purposes" of the person to whom the report is furnished and not the "employment purposes" of the person about whom it is furnished. There is no contention in this case that Dr. Hoke was being considered by the Texas Board for employment by the Board. Rather, it is clear from the affidavits which accompanied Retail Credit's motion for summary judgment that the Texas Board obtained the report in question as an aid in its required evaluation of Dr.Hoke's moral character, reputation and competence to practice medicine. The Board's purpose in seeing that Dr. Hoke met its criteria for a license to practice medicine was to discharge its statutory responsibility to the people of Texas. Whether Dr.

Hoke ever became "employed" in Texas, it is submitted, was of no concern to the Board.

In view of the foregoing, Petitioners submit that it is impermissible and erroneous for the Court of Appeals to define the word "employment" in a "broad generic sense" and then use this as a springboard to bring a situation in which the party to whom information was furnished had no employment purpose whatsoever into the ambit of the FCRA because the person about whom the information was furnished may have had, in the abstract, some "employment" motives. The construction given the FCRA in this regard by the Court of Appeals cannot, petitioners contend, be squared with the intent of the Act as seen above.

Nor, petitioners further contend, can the construction of the Court of Appeals be squared with the spirit and philosophy of the FCRA. The Congressional purpose for enactment of the FCRA is unequivocally stated in § 1681(b) to be "to require that consumer reporting agencies adopt reasonable procedures for *meeting the needs of commerce*" for various types of information. As stated by the court in *Porter* v. *Talbot Perkins Children's Services*, 355 F.Supp. 174, 178 (S.D.N.Y. 1973):

> The focus of Congress was the consumer credit industry (§ 1681) which has been exercising a growing influence in *economic decision making.* (emphasis added)
>
> . . .
>
> Entities whose function is far removed from the *commercial world* are not brought under this standard. (emphasis added)
>
> . . .

> [T]he Fair Credit Act as enacted has a . . . limited purpose and effect; *it is designed to check informational abuses in the commercial arena.* (emphasis added)

Neither the language of the FCRA nor any authority wherein it was construed or interpreted even remotely suggests that other than business or commercial considerations are embraced within the FCRA. Indeed, not even all commercial considerations come within the FCRA. See, *Fernandez* v. *Retail Credit Co.*, *supra*; *Sizemore* v. *Bambi Leasing Corp.*, *supra*; *Wrigley* v. *Dun & Bradstreet, Inc.*, *supra*. Rather, the FCRA is limited to that class of commercial considerations involving consumers in their individual and personal capacity. *Sizemore* v. *Bambi Leasing Corp.*, *supra*. How, therefore, can the Court of Appeals realistically take the position that a consideration of Dr. Hoke's professional qualifications to practice medicine was intended by Congress in the phrase "employment purposes" in §§ 1681a(d) and 1681(3)(B) to bring a report within the FCRA? Such a consideration does not involve a business or commercial consideration in common parlance and it would be manifestly contrary to the philosophy and purpose of the FCRA to include such a consideration within the ambit of the Act. The Texas Board, in any realistic appraisal, must be considered an entity "whose function is far removed from the commercial world" and therefore without the bounds of the FCRA. This important question of federal law is in serious need of resolution by this Court.

B. The Holding of the Court of Appeals that § 1681a(d)(3) of the FCRA Incorporates Only the "General Subject Matter (But Not All Specific Detail) of § 1681b(3)(D)" Contravenes the Plain Language of the FCRA

Section 1681a(d) of the FCRA defines the term "consumer report" as virtually any information concerning an individual "which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the [individual's] eligibility for . . . (3) other purposes authorized under section [1681b]." Retail Credit submits that if § 1681 a(d)(3) defines "consumer report" by reference to the "other purposes authorized under section [1681b]," there is no authority for the Court of Appeals to arbitrarily decide that those purposes are anything other than what is expressly stated in § 1681b. Yet this is just what the Court of Appeals has done.

As recognized by the Court of Appeals, one of the "other purposes" listed in § 1681b which could apply on the facts of this case is that set forth in § 1681(3)(D): use of the information "in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status." In the view of the Court of Appeals a period may be inserted following the word "instrumentality" in § 1681(3)(D) when this section is incorporated into the definitional structure of § 1681a(d)(3), resulting in the phrase "required by law to consider an applicant's financial responsibility or status" being irrelevant in defining "consumer report." This result is belied by the clear language of §§ 1681a(d)(3) and 1681b(3)(D) and Retail Credit fails to see any proper ground for reaching such a result. Under the approach taken by the

Court of Appeals, language could likewise be ignored in subparts (A), (B), (C) and (E) of § 1681b(3) to arrive at whatever result the Court of Appeals wished. For instance, ignoring the phrase "involving the consumer" in § 1681(3)(C) would give the result that information used "in connection with the underwriting of insurance" would become a "consumer report." There is simply no basis for the Court of Appeals to so determine *sua sponte* what the statute *should* say and such action by the court so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Retail Credit strongly believes and would urge this Court to find that § 1681a(d)(3) does incorporate for purposes of defining "consumer report" all of the language in § 1681b. This being so and the affidavit of the Texas Board being clear that the Board had no legal duty to consider Dr. Hoke's financial responsibility or status, § 1681(3)(D) as incorporated in § 1681 a(d)(3) for definitional purposes affords no basis for ruling the report in question to be a "consumer report."

The Court of Appeals complains that if the construction contended for by Retail Credit be given effect, the coverage of the FCRA would be restricted. This is not sufficient reason for the Court to adopt the artificial construction set out in its opinion. Because the court apparently did not like the result called for by the plain language of the FCRA, it has effectively legislated to cause the Act to reach a different and, petitioners believe, unwarranted result. This is manifestly beyond the authority of the Court of Appeals and requires the corrective action of this court.

Section 1681f of the FCRA provides:

> Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addressess, places of employment, or former places of employment, to a governmental agency.

The Court of Appeals takes the position that what it terms "the minutiae of § 1681(3)(D)" must be ignored when this section is incorporated into § 1681a(d)(3) because, in its view, otherwise § 1681f "would be rendered superfluous." The court observes, correctly petitioners believe, that when § 1681a(d)(3) is read as incorporating all of § 1681(3)(D) a consumer reporting agency

> could report the information authorized by section 1681f, and more, with impunity, if it could establish that the governmental agency to which it reported was not required by law to consider an applicant's financial responsibility or status and, hence, that the information reported was not a "consumer report" within the meaning of §1681 a(d).

This result is appropriate, petitioners believe, for the simple reason that the FCRA was not intended to apply where a "consumer report" is not involved. The FCRA was not intended to cover all information reporting situations. Yet the expansive view taken of the statute by the Court of Appeals in this case greatly enlarges the scope of the Act's coverage to a point well beyond that which is evident from the plain language of the statute.

The Court of Appeals adverts in its opinion to the provision of [1681b(3)(D) that the furnisher of in-

formation "has reason to believe" that the licensing body to which a report is made be required by law to investigate financial responsibility or status. This overlooks the fact that the belief of Retail Credit with respect to the duty of the Texas Board to investigate financial responsibility or status is not relevant unless Retail Credit is furnishing to the Texas Board a "consumer report." This is because § 1681b begins by stating: "A consumer reporting agency may furnish a *consumer report* under the following circumstances and no other . . . ." (emphasis added) The view of the Court of Appeals seems to be that the report in question was a "consumer report" and thus the belief of Retail Credit regarding the authority of the Texas Board must be considered. But whether a "consumer report" is present is the very proposition before the court and surely the court is not permitted to treat the report in question as a "consumer report" for the very purpose of fitting it under a provision of the FCRA which makes it a "consumer report." This "guilty until proven innocent" approach presents Retail Credit with a burden impossible to sustain and represents, again, a departure from the accepted and usual course of judicial proceedings of such magnitude as to call for an exercise of this Court's power of supervision.

CONCLUSION

The decision of the Court of Appeals below raises an important question of federal law which should be settled by this Court to avoid the impediments to commerce that decision has raised in a time of general commercial uncertainty throughout the country. The decision below, in its departure from the usual course of judicial proceedings in numerous respects, has re-

sulted in substantial injustice to the petitioners and created unwaranted uncertainty in the credit reporting industry, an industry which is basic to the system of commerce in this country.

The petition for certiorari should be granted.

Dated: November 12, 1975.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2358

HAROLD REED HOKE, M.D., *Appellant,*

v.

RETAIL CREDIT CORPORATION, GEORGE JACKINS and FRANK GARRIS, *Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
F. T. Dupree, Jr., District Judge.

Argued June 12, 1975 Decided August 19, 1975

Before HAYNSWORTH, WINTER, and CRAVEN, *Circuit Judges.*

Grover Prevatte Hopkins for Appellant; Michael E. Weddington, (James D. Blount, Jr., Smith, Anderson, Blount and Mitchell on brief) for Appellee.

WINTER, *Circuit Judge:*

Suing under the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1671 *et seq.*,[1] Dr. Harold Reed Hoke sought

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[1] The action was specifically based on 15 U.S.C. §§ 1681n and 1681o which create causes of action in favor of consumers against consumer reporting agencies if the reporting agency has either negligently or willfully failed to comply with "*any* requirement" (emphasis added) of FCRA. The requirement specifically at is-

damages from Retail Credit Corporation (Retail Credit) and two of its employees [2] for injuries allegedly sustained from inaccurate information contained in a personal report issued by Retail Credit to the Texas Board of Medical Examiners. The Board had requested the report to aid in its assessment of Dr. Hoke's application for a license to practice medicine in Texas. The district court rendered summary judgment in favor of the defendants, concluding that the plaintiffs could not prevail as a matter of law because the report was not a "consumer report" within the meaning of FCRA.[3] Since, in our view, the report was a "consumer report" covered by FCRA, we reverse and remand for further proceedings consistent with this opinion.

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sue here is § 1681e(b) which provides that a consumer reporting agency must "follow reasonable procedures to assure the maximum possible accuracy of the information" contained in a consumer report; Dr. Hoke alleges that Retail Credit did not do so here.

Jurisdiction is based on 15 U.S.C. § 1681p which gives jurisdiction to enforce any liability created by the Act, without regard to amount in controversy, to "any appropriate United States district court" or "any other court of competent jurisdiction."

[2] Neither § 1681n nor § 1681o creates a cause of action against the individual employees of a consumer reporting agency. Although the district court noted this omission, it did not decide if employees could be sued under FCRA since it concluded that FCRA was not allegedly violated. We do not decide the issue either. The district court will undoubtedly reach it on remand.

[3] The district court concluded that subject matter jurisdiction was lacking, although its summary judgment, under Rule 56 F.R. Civ.P., was a final adjudication on the merits. Under § 1681p, the district court had subject matter jurisdiction because this was an "action to enforce any liability created" by FCRA. We therefore construe the judgment as an adjudication, on the merits, that the report involved here was not a "consumer report" and thus that this "action to enforce" the liabilities created by FCRA could not be maintained as a matter of law. *See generally* 10 Wright & Miller, Federal Practice and Procedure, § 2712 (1973).

I.

The case turns on FCRA's definition of "consumer report." In pertinent part, § 1681a(d) provides:

> (d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or moder of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title . . . .[4]

A consumer report, therefore, is virtually any information communicated by a "consumer reporting agency" for any one of the purposes enumerated in 1681a and 1681b, including but not limited to, "employment purposes" (§ 1681a(d) and § 1681b(3)(B)) and eligibility for a government license or benefit (§ 1681b(3)(D)). Since there can be no question but that Retail Credit is a consumer reporting agency within the terms of the FCRA,[5] we must decide whether the allegedly inaccurate information was furnished by Retail Credit for one or more of the purposes specified in §§ 1681a and 1681b.

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[4] The remainder of § 1681a describes three types of reports which are excluded from the statutory definition, none of which is relevant here.

[5] Section 1681a(f) provides:

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing consumer reports.

II.

We consider first if the furnishing of the report was for "employment purposes" within the meaning of §§ 1681a(d) and 1681b(3)(B).[6]

The purpose of the Texas licensing procedure is to assess and certify Dr. Hoke's fitness and eligibility to practice medicine within the state of Texas. Although the terminology customarily used with regard to the employment of persons engaged in ordinary commercial activities is sometimes ill-suited to a description of the practice of a learned profession, in the context of FCRA the practice of medicine necessarily takes the form of some type of "employment." A physician may accept full or part-time employment as a physician by a hospital, clinic, medical school, or professional association. In those instances he is an employee, albeit a professional one. If he concludes to practice his profession as a single practitioner or as a member of a medical partnership, we still consider him as "employed," either self-employed or employed by the patients who pay him fees for the medical services that he provides.[7] And since the *sine qua non* to the practice of

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[6] The "employment purposes" language of § 1681a(d) has been quoted in the text. Section 1681b(3)(B) is no more specific. It merely provides that a consumer reporting agency may furnish a consumer report to a person which it has reason to believe "intends to use the information for employment purposes."

[7] If we were to apply the common-law concept of employee, we would undoubtedly conclude that a physician who practiced his profession as a sole practitioner or as a member of a medical partnership was an independent contractor, and not an employee, because of the absence of control over the manner in which he afforded expert medical services. But in construing FCRA, we are cognizant of its broad remedial purposes, 15 U.S.C. § 1681, and we are not constrained to limit its application by the common-law concept of master and servant. N.L.R.B. v. Hearst Publications, 322 U.S. 120 (1944); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4 Cir. 1974).

medicine in Texas, and elsewhere, is a license to practice medicine, and since the information furnished by Retail Credit related to the question of whether the license would be granted, we have no hesitancy in concluding that the information was furnished for "employment purposes" in the broad generic sense of the words.

The statutory definition of employment purposes within the Act is (15 U.S.C. § 1681a(h)):

> The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

The statutory definition adopts the generic meaning of the words defined. We note, of course, the concluding words of this definition—"as an employee." It might be argued that the term "employment purposes" is restricted to the situation in which information is sought by an actual or prospective employer, e.g., if the Texas Licensing Board were to hire Dr. Hoke itself. But we think not. Such an argument assumes that the phrase "as an employee" modifies both "retention" *and* the words preceding it—"employment, promotion, reassignment." We think it modifies only "retention." The words "employment, promotion, [and] reassignment," having specific meanings in the area of activities for the production of income, need no modifier. By contrast, "retention," a word of varied meanings in varied contexts, does. Hence, we conclude that the statutory and generic definitions of the operative words are congruent and that furnishing information in the present circumstances brought Retail Credit under the terms of FCRA.

III.

The report involved here is also a consumer report under §§ 1681a(d)(3) and 1681b(3)(D). We reach this conclusion from the actual language of §§ 1681a(d) and 1681b

(3)(D) and from the presence of § 1681f, its legislative history, and its place in the overall statutory scheme. Section 1681b(3)(D) provides:

> A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> . . .
>
> (3) To a person which it has reason to believe—
>
> . . .
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality *required by law to consider an applicant's financial responsibility or status* . . . . (Emphasis added.)

Retail Credit asserts that the report involved here is not a "consumer report" under those sections. Its argument is that § 1681a(d) incorporates all of the language contained in § 1681b(3)(D), including the requirement that the governmental agency to which the report is furnished be "required by law to consider an applicant's financial responsibility or status." Since the Texas State Board of Medical Examiners, under the evidence adduced on the motion, is not required by law to be concerned with plaintiff's financial responsibility or status, so the argument runs, the information furnished could not constitute a "consumer report."[8] We disagree.

While § 1681a is a purely definitional section, § 1681b is, as its title states, a list of the "Permissible purposes of

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[8] A defect in Retail Credit's argument, but not the one on which we pitch our decision, is that it overlooks the provision of § 1681b (3)(D) that the furnisher of information "has reason to believe" that the licensing body to which a report is made be required by law to investigate financial responsibility or status. The actual authority of the Texas Board may be irrelevant if Retail Credit had a good faith belief that the Board had a statutory duty to investigate financial responsibility.

consumer reports." Only secondarily does § 1681b(3)(D) supplement § 1681a's definition of what is a "consumer report," and then only according to the language in the latter and not because of an additional specific definition in § 1681b.

What is most significant is that § 1681a(d), in listing the purposes which render the furnishing of information a "consumer report" speaks in terms of "eligibility for . . . [the] purposes authorized under section 1681b . . . ." Translated to the facts of this case, § 1681a(d)(3) may be read to mean that the furnishing of information about an individual to serve as a factor for a determination of plaintiff's eligibility for a license to practice medicine renders the report a "consumer report," irrespective of the actual authority of the Texas licensing board to consider financial responsibility or status, or Retail Credit's reasonable belief as to the board's authority. The matter of the board's authority to consider financial responsibility or status, or Retail Credit's reasonable belief as to the board's authority in that respect, is significant only to Retail Credit's statutory right to furnish the information, not as to whether the information furnished is a "consumer report."[9] We so read it. It is not necessary to read § 1681a(d)(3) as incorporating all of the minutiae of § 1681b(3)(D), only the general subject matter.

There is a compelling reason to read § 1681a(d)(3) as incorporating only the general subject matter (but not all specific detail) of § 1681b(3)(D). A reading which separates restrictive and definitional aspects of § 1681b(3)(D) is necessary to give meaning and effect to § 1681f, which provides:

> Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish

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[9] All of the details of § 1681b(3)(D) are necessarily relevant to authority to issue the report by virtue of the opening language of that section: "under the following circumstances and no other . . . ."

> identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

If § 1681a(d)(3), the definitional provision, is read to incorporate all of the restrictive detail of § 1681b(3)(D), § 1681f would be rendered superfluous, because a consumer reporting agency (Retail Credit) could report the information authorized by § 1681f, and more, with impunity, if it could establish that the governmental agency to which it reported was not required by law to consider an applicant's financial responsibility or status and, hence, that the information reported was not a "consumer report" within the meaning of § 1681a(d). Section 1681b(3)(D) would, in effect, restrict the coverage of FCRA rather than the activities of consumer reporting agencies.

The legislative history belies this result. The Senate committee report explained the relationship between the two sections in this way:

> The disclosure of information to governmental agencies is limited to identifying type information . . . unless the governmental agency has obtained a court order or is a bona fide creditor, insurer, employer, or licensor." Report of the Committee on Banking and Currency, Fair Credit Reporting, Sen. Rep. No. 91-517, 91st Cong., 1st Sess. at 6 (1969).[10]

See also United States v. Puntieri, 379 F.S. 332 (D. N.Y. 1974); FTC v. Manager, Retail Credit Co., Miami Branch Office, 357 F.S. 347 (D. D.C. 1973), rev'd on other grounds, 515 F.2d 988 (D.C.Cir. 1975). If Retail Credit's view of FCRA were adopted, a consumer reporting agency would

---

[10] The report quoted has reference to the original version of the Bill, S. 823. Although certain amendments on other points were incorporated into the version which was finally passed, there were no amendments to the provisions concerning communication of consumer information to government agencies.

have greater latitude in providing information to a government agency that was not a "bona fide creditor, insurer, employer, or licensor" than in reporting to one that was. This was clearly not the result intended.

Since the information furnished by Retail Credit was a "consumer report" within the meaning of § 1681a(d) both because it was to be used for "employment purposes," as defined in §§ 1681a(h) and 1681b(3)(B), and for determination of plaintiff's eligibility for a license to practice medicine within the meaning of § 1681b(3)(D) as partially incorporated into § 1681a(d), plaintiff must be afforded the opportunity to prove his case.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 1301

HAROLD REED HOKE, M.D., *Plaintiff*

v.

RETAIL CREDIT CORPORATION, GEORGE JACKINS and FRANK GARRIS, *Defendants*

Memorandum of Decision

[Filed October 11, 1974]

Plaintiff, a physician who formerly resided in Greenville, North Carolina, desiring to move to Texas and re-establish his practice there, made application to the Texas Board of Medical Examiners for a license to practice in that state. In connection with the Board's investigation of the plaintiff it requested a report from the defendant Retail Credit Corporation covering plaintiff's professional standing in the Greenville, North Carolina area. Alleging that the two reports furnished in response to this request contained false and highly defamatory matter in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and libel under North Carolina law, plaintiff brought this action for damages against Retail Credit and two of its employees, the named individual defendants.[1] The case is before the court on the motion of defendants for summary judgment on the grounds that the reports in question do not consti-

[1] 15 U.S.C. §§ 1681n, 1681o, 1681p create causes of action in favor of consumers and against consumer reporting agencies for willful or negligent noncompliance with the Act and invest the United States district courts and "any other court of competent jurisdiction" with jurisdiction over the same "without regard to the amount in controversy."

tute "consumer reports" under the FCRA and that therefore the court has no jurisdiction over the subject matter.[2]

The Act by its own terms applies only to credit reports satisfying the statutory definition of "consumer report" contained in 15 U.S.C. § 1681a(d) which reads in pertinent part as follows:

> "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title."

Retail Credit is admittedly "a consumer reporting agency" within the meaning of the Act,[3] and the reports it furnished on the plaintiff herein certainly had a bearing on his general reputation, personal characteristics and mode of living. Since the reports were not used or expected to be used in whole or in part as a factor in estab-

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[2] While the complaint denominates the reports in question as "consumer investigative reports", the statute refers only to "consumer reports" and "investigative consumer reports." Assuming that plaintiff intended to characterize the accused documents as "investigative consumer reports", the statutory definition of this term indicates that it is a species of "consumer report", 15 U.S.C. § 1681a(e), and the question thus remains as to whether the reports in question here qualify in the first instance as "consumer reports". The parties have recognized this in their briefs and oral arguments.

[3] Arguably the individual defendants as salaried employees of the corporate defendant do not so qualify, but in view of the decision the court has reached it does not become necessary to decide this question.

lishing plaintiff's eligibility for credit, insurance or employment, the inquiry here narrows to the question of whether the reports were to be used for "other purposes authorized under Section 1681b of this title."

The pertinent provisions of 15 U.S.C. § 1681b read as follows:

> "A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> "(1) . . .
>
> "(2) . . .
>
> "(3) To a person which it has reason to believe—
>
> "(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> "(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

In support of their motion for summary judgment defendants have submitted an affidavit by the Secretary of the Texas State Board of Medical Examiners establishing that the reports in question were requested by the Board for the purpose of assisting it in evaluating the moral and ethical background of the plaintiff "as a part of the Board's overall determination of Dr. Hoke's fitness to practice medicine in the State of Texas," and that the reports were not "in whole or in part for the purpose of serving as a factor in establishing the said Dr. Hoke's eligibility for credit, insurance or employment." Plaintiff obtained a supplementary affidavit from this same affiant from which it appears without question that "the Texas State Board of Medical Examiners is not required by law to consider the financial responsibility of those persons

who apply to the Board for a license to practice medicine in the State of Texas" and that the Board "is not required by law to consider the financial status of those persons who apply to the Board for a license to practice medicine in the State of Texas." The affidavit establishes that the Board is required by law to consider the professional status of applicants for medical licenses and that the affiant "understands professional status to mean the moral character, reputation and competence to practice medicine of the applicant." In the opinion of the court the purposes for which these reports were requested do not serve to qualify them as "consumer reports" within the purview of Section 1681b(3)(D) of the Act.[4]

This leaves for consideration the question of whether the Board of Medical Examiners had "a legitimate business need for the information in connection with a business transaction" involving the plaintiff within the meaning of Section 1681b(3)(E) of the Act.[5] The cases in which this section of the Act have been considered hold that the terms "legitimate business need" and "in connection with a business transaction" refer to needs and objectives of the person to whom the report is furnished and not business needs of the person about whom it is furnished. *Fernandez* v. *Retail Credit Company,* 349 F.Supp. 652 (E.D.La. 1972); *Sizemore* v. *Bambi Leasing Corporation,* 360 F.Supp. 252 (N.D.Ga. 1973); *Wrigley* v. *Dun & Bradstreet, Inc.,* 375 F.Supp. 969 (N.D.Ga. 1974). In the opinion of the court the reports in question here were not obtained by the Board of Medical Examiners to serve a

---

[4] Plaintiff has advanced the ingenious argument that the word "financial" in Section 1681b(3)(D) modifies only the word "responsibility" and that standing alone the word "status" would encompass professional status. In the opinion of the court the word "financial" clearly modifies "responsibility" and "status".

[5] This point was scarcely addressed by the parties in their briefs or on oral argument.

"business need" of the Board or in connection with "a business transaction" as these terms are used in the Act. Thus they did not become "consumer reports" by reason of the operation of Section 1681b(3)(E).

The jurisdiction of this court having been invoked solely on the basis of the Fair Credit Reporting Act, and the plaintiff having failed to bring the accused documents furnished by defendants within that Act's ambit, it follows that the court is without jurisdiction and defendants' motion for summary judgment must be sustained. An order dismissing the action will be entered.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

October 11, 1974.

A True Copy, Teste:
JOHN R. WHITTY, *Clerk*
By /s/ JOYCE W. TODD
Deputy Clerk

(SEAL)

APPENDIX C

The Fair Credit Reporting Act provides in pertinent part:

1681. *Findings and purpose.*—(a) The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

1681a. *Definitions and rules of construction.*—(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604 [§ 1681b of this title].

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(h) The term "employment purposes" when used in connection with a consumer report means a report used

for the purpose of evaluating a consumer for employment, promotion, reassignment or rentention as an employee.

1681b. *Permissible purposes of reports.*—A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

1681f. *Disclosures to governmental agencies.*—Notwithstanding the provisions of section 604 [1681b of this title], a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-730

HAROLD REED HOKE, M.D.,
Respondent,

v.

RETAIL CREDIT CORPORATION,
GEORGE JACKINS and FRANK GARRIS,
Petitioners.

To the United States Court of Appeals
Fourth Circuit

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
1. Argument in Contra to the Petitioner's Reasons for Granting the Writ	2
A. Synopsis of the Respondent's Position	2
B. Respondent's Argument in Contra to the Petitioner's View that the Determination of the Court of Appeals that the Report in Question was intended for Use in "Employment Purposes" is contrary to the Plain Language of FCRA as well as the Spirit and Intent of the FCRA	3
C. Respondent's Argument in Contra to the Petitioner's View That: The Holding of the Court of Appeals that § 1681a(d)(3) of the FCRA Incorporates only the "General Subject Matter (But Not all Specific Detail) of § 1681b(3)(D)" Contravenes the Plain Language of the FCRA	10
2. Conclusion	17

CASES:

Ackerley v. Credit Bureau of Sheridan, 385 F. Supp. 658 (1974)	16
Belshaw v. Credit Bureau of Prescott, 392 F. Supp. 1356 (1975)	16
Fernandez v. Retail Credit Co., 349 F. Supp. 652 (E.D. La. 1972)	6
F.T.C. v. Manager, Retail Credit Co., Miami Branch, 357 F. Supp. 347 (1973)	14
Goldfarb v. Virginia State Bar, 95 S.Ct. 2004 (1975)	9
Hoke v. Retail Credit Corp. 521 F.2d 1079 (1975) 4th Cir.	5
Porter v. Talbot Perkins Children's Services, 355 F. Supp. 174 (S.D.N.Y. 1973)	8
Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252 (N.D. Ga. 1973)	6, 7, 8
U.S. v. Puntieri 379 F. Supp. 332, 334 (D.N.Y. 1974)	13
Wrigley v. Dun and Bradstreet, 375 F. Supp. 969 (N.D. Ga. 1974)	6, 7, 8

Page

STATUTES:

15 USCS 1681(a)(4) 2
15 USCS 1681(b) 2, 5, 9
15 USCS 1681(h) 3
15 USCS 1681a(b) 15
15 USCS 1681a(c) 5, 8, 15
15 USCS 1681a(d) 13
15 USCS 1681a(d)(3) 10
15 USCS 1681a(d) 6
15 USCS 1681a(d)(1) 6
15 USCS 1681a(f) 8
15 USCS 1681b 6, 7, 10, 12, 13, 14
15 USCS 1681b(2) 2
15 USCS 1681b(3)(D) 10, 11
15 USCS 1681b(3)(E) 6, 7
15 USCS 1681f 2, 12, 13, 14

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RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

The statement of the Petitioner set out under the headings *Opinions Below, Jurisdiction, Questions Presented, Statute Involved,* and *Statement of the Case* is not contested by the Respondent except for the Conclusions drawn by the Petitioners as to error committed by the Court of Appeals.

ARGUMENT IN CONTRA TO THE PETITIONER'S REASONS FOR GRANTING THE WRIT

A. Synopsis of the Respondent's Position:

The Petitioner/Company proposes to this Honorable Court that this case "will directly affect the way in which professional licensing boards throughout the country screen applicants for medical, legal and other professional licences". So be it. The holding of the Honorable Fourth Circuit Court of Appeals requires that a consumer reporting agency be held responsible when it does not meet "their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" as mandated in 15 USCS 1681(a)(4) ". . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information. . ." as required by 15 USCS 1681(b). The decision of the Fourth Circuit Court of Appeals requires that a consumer reporting agency either restrict itself to that information authorized in 15 USCS 1681 f, limiting disclosures to governmental agencies, or, in the alternative, be held to reasonable standards of fairness and equity to the consumer. The Petitioner/Credit Company, in asserting the need for the licensing boards to have access to this material concerning applicants, has overlooked the provision of 15 USCS 1681b(2) allowing the information to be provided by the permission of the individual. No licensing board is going to be hard pressed if they but include in their application forms a phrase allowing the release of consumer reporting agency information.

The Petitioner/Credit Company further complains that the Fourth Circuit Court of Appeals has departed from the accepted and usual course of judicial pro-

ceedings. The Petitioner/Credit Company takes issue with the Court of Appeals' interpretation of the language of the FCRA. The respondent would respectfully argue to this Honorable Court that the Court of Appeals has understood quite fully the Congressional intent of the FCRA and the sure syntax of the English language to express this intent.

B. Respondent's Argument in Contra to the Petitioner's View That:

> The Determination of the Court of Appeals that the Report in Question was Intended for Use in "Employment Purposes" is contrary to the Plain Language of FCRA as well as the Spirit and Intent of the FCRA.

Section 1681(h) defines "employment purposes";

> The term "employment purposes", when used in connection with a consumer report, means a report used for the purpose of a consumer for employment, promotion, reassignment or retention as an employee.

Petitioner argues that not to read this section as meaning "employment as an employee, Promotion as an employee, reassignment as an employee and retention as an employee" is a departure from accepted norms of English usage. Respondent, however, would argue that it would be this tautology that would fly in the face of accepted, correct usage of the English Language.

Webster's New 20th Century Dictionary, unabridged, 2d Edition defines:

> *employment:* (1) The act of employing or the state of being employed. (2) Work; occupation; business; that at which one is employed; as agricultural employments, mechanical employments.

promotion: (1) A promoting; furtherance. (2) the result of promoting; advancement. (3) the stirring up of interest in an enterprise.

reassignment: The act of reassigning. *Assign:* (1) to allot; to appoint or grant by distribution or apportionment; also, to give out as a task. (2) To designate or appoint for a particular purpose, duty, etc. (3) to fix, specify, or designate; as, to assign a day for a judicial hearing. (4) In law, to transfer or make over to another, as an estate; in bankruptcy, to transfer (property) to, and vest in certain persons, called assignees, for the benefit of creditors. (5) to ascribe; refer to; as to assign a reason for one's conduct.

retention: (1) the act of retaining or keeping; the state of being retained. (2) The power of or capacity for retaining. (3) (a) a remembering; the faculty of the mind by which it retains ideas; memory; (b) ability to remember. (4) In medicine, a morbid accumulation of solid or liquid matter in vessels of the body or cavities intended to contain it only for a time. (5) The act withholding; reserve; restraint. (Obs.) (6) The state of being confined; custody; confinement. (Obs.) (7) In Scots Law, a lien; a right of withholding a debt or retaining property until a debt due to the person claiming this right is paid.

The above dictionary definitions of the words employment, promotion, reassignment and retention demonstrate concretely that only "retention" needs the modifier "as an employee", and the Court of Appeals is most correct in its understanding of the Act and the English language when it states:

> The words "employment, promotion [and] reassignment," having specific meanings in the area of activities for the production of income, need no

> modifier. By contrast, "retention," a word of varied meanings in varied contexts, does. Hence, we conclude that the statutory and generic definitions of the operative words are congruent and that furnishing information in the present circumstances brought Retail Credit under the terms of FCRA. *Hoke* vs. *Retail Credit Corp.*, 521 F.2d 1079, 1082.

The Petitioner/Credit Company argues to this Honorable Court that the construction placed on the wording "employment purposes" is contrary to the spirit and intent of FCRA.

The Congressional intent is stated clearly at § 1681(b);

> It is the *purpose* of this title to *require* that consumer reporting agencies *adopt reasonable procedures* for meeting the needs of commerce for consumer credit, *personnel,* insurance, and *other information* in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information in accordance with the requirements of this title. (emphasis added).

The choice of the word *personnel* by Congress gives insight to the spirit and intent of FCRA. While later defining "business purposes" and speaking of employment, we understand that this is in the context of its stated *purpose* at § 1681(b).

Webster's defines personnel:

> *Personnel:* persons employed in any work, enterprise, service establishment, etc.

And, at § 1681a(c) Congress defines consumer:

> The term "consumer" means an individual.

That is to say the Congressional spirit and intent is to protect *individuals* by requiring *reasonable procedures* by credit reporting agencies in matters of *personnel* and *other information.* The respondent, a physician, is an individual, forms part of the personnel constituting the medical profession, about whom a consumer reporting agency provided information, be it personnel information or "other information".

Petitioner/Credit Company cites in its petition three cases to indicate that it is the objective of the person to whom the report is provided that activates FCRA. (*Fernandez* v. *Retail Credit Co.,* 349 F.Supp. 652 (E.D.La. 1972); *Sizemore* v. *Bambi Leasing Corp.,* 360 F.Supp. 252 (N.D.Ga. 1973); and *Wrigley* v. *Dun and Bradstreet, Inc.,* 375 F.Supp. 969 (N.D.Ga. 1974), aff'd. without opinion 500 F.2d 1183 (5th Cir. 1974).) Respondent would argue that these cases have no bearing on the issue before this Honorable Court. *Fernandez* deals with the purchase of commercial or business insurance *by a corporation* and clearly not covered in the limitation of § 1681a(d)1 which speaks of the consumer's, i.e. an individual's eligibility for ". . . insurance to be used primarily for personal, family or household purposes,"

Section 1681b(3)(E) is one of the five other "permissible purposes" for which a consumer reporting agency may furnish a consumer report. Assuming arguendo, it is the need of the person to whom the report is furnished that activates FCRA, as asserted by the Petitioner; then the position of the Petitioner/Credit Company is most inconsistent.

The pertinent parts of this section read:

1681b. Permissible purposes of reports.—A consumer reporting agency *may* furnish a consumer

report under the following circumstances and *no other:*

(1) .....

(2) .....

(3) To a person which it has *reason to believe*—

(A) .....

(B) .....

(C) .....

(D) .....

(E) otherwise, has a legitimate business need for the information in connection with business transaction involving the consumer. (emphasis added)

The Petitioner/Credit Company has either *reason to believe* that there exists a legitimate business need on the part of the Medical Board for the information, therefore the report is a "consumer report" or has provided the information in rank contempt of the Congressional instruction prohibiting the passing of the information. The Petitioner/Credit Company argues that the report is a non-consumer report, therefore non-covered by the FCRA because the Credit Company furnished a report specifically precluded by § 1681b, then asks the Courts to dismiss the Plaintiff/Respondent's action on the grounds that by violating the clear enjoinder of Congress, the Defendant/Petitioner does not fall within the ambit of FCRA.

In the other two cases cited by the Petitioner, *Sizemore* and *Wrigley,* the Respondent does not find any reference to § 1681b(3)(E). Both cases concern commercial credit for a company, not an individual, i.e.,

a consumer as defined by § 1681a(c). *Sizemore* concerned the lease of a vehicle by a company and *Wrigley* dealt with a credit report on a construction company for commercial credit. These cases are highly distinguishable from the case *sub judice* involving a report on an individual seeking a license from a governmental instrumentality.

The Petitioner argues that the "meeting the needs of commerce" phrase in the Congressional purpose excludes this case from the ambit of FCRA. To read the statement of Congressional purpose, purely a response to the needs of commerce, is to obviate the remainder of the language of the stated purpose employing such phrases as "require . . . consumer reporting agencies adopt reasonable procedures . . . for . . . personnel, . . . and other information in a manner which is fair and equitable to the consumer, with regard to the . . . accuracy . . . and proper utilization of such information. . . . The Petitioner/Credit Company cites as authority *Porter* v. *Talbot Perkins Children's Services,* 355 F.Supp. 174 (S.D.N.Y. 1973). In *Porter,* a potential adopting parent complained of the accuracy of information in the possession of an adoption service. The FCRA's purpose is to require certain standards of "consumer reporting agencies", defined at § 1681a(f):

> The term "consumer reporting agency" means any person which, for monetary fees, dues, or on cooperative nonprofit basis regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to *third parties,* and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. (emphasis added)

An adoption agency is not in the business of collecting information for third parties and clearly is a vastly separate and distinct function from a consumer reporting agency operating in interstate commerce. An adoption agency is "far removed from the commercial world". The Court in *Porter* points out that the FCRA ". . . is designed to check informational abuses in the commercial arena." The Respondent respectfully submits to this Honorable Court that the informational abuses in the commercial arena occupied by consumer reporting agencies using the facilities of interstate commerce are in need of checking, and that the Congressional check imposed by FCRA is necessary "to meet the needs of commerce" as stated in the Congressional purpose at § 1681(b).

The Petitioner/Credit Company argues that the Texas Board is an entity "whose function is far removed from the commercial world". The Respondent would argue that the fees charged by consumer credit reporting agencies to licensing boards nation-wide for reports are not far removed from the commercial world, nor the activities of the consumer reporting agencies which provide such licensing boards with information are engendered by some eleemosynary motive. Medicine as "learned profession" is not compatible with every aspect of a commercial enterprise. Medicine, like law, cannot be denied to play an important part in commercial intercourse. (*Goldfarb* v. *Virginia State Bar,* 95 S.Ct. 2004 (1975). To assert that the licensing of medical practitioners is far removed from the commercial arena is to repose an unwarranted confidence in the altruism in the medical profession.

C. Respondent's Argument in Contra to the Petitioner's View That:

The Holding of the Court of Appeals that § 1681a (d)(3) of the FCRA Incorporates only the "General Subject Matter (But Not All Specific Detail) of § 1681b(3)(D)" Contravenes the Plain Language of the FCRA.

Section 1681a(d) and 1681b(3)(D) state, in part:

> The term "consumer report" means any . . . communication . . . by consumer reporting agency bearing on a consumer's . . . character, general reputation . . . which is used *or expected to be used* . . . for . . .
>
> (1) . . . .
>
> (2) . . . .
>
> (3) other purposes authorized under section 604 [1681b of this title].

1681b. Permissible purposes of reports.—A consumer reporting agency may furnish a consumer report under the following circumstances and *no other:*

> (1) . . . .
>
> (2) . . . .
>
> (3) To a person which it has reason to believe—
>
> (A) . . . .
>
> (B) . . . .
>
> (C) . . . .
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental

> instrumentality required by law to consider an applicant's financial responsibility or status; or
> (E) . . . .

Petitioner/Credit Company argues that the Court of Appeals has put a fugitive period after the word "instrumentality" and thus rendered the following words "required by law to consider an applicant's financial responsibility" as some grotesque Congressional pleonasm. The Court of Appeals on hearing below stated:

> Translated to the facts of this case, § 1681a(d)(3) may be read to mean that the furnishing of information about an individual to serve as a factor for a determination of plaintiff's eligibility for license to practice medicine renders the report a "consumer report," irrespective of the actual authority of the Texas licensing board to consider financial responsibility or status, or Retail Credit's reasonable belief as to the board's authority.

If the Court of Appeals has added any periods, fugitive or otherwise, it would occur after the word "license", thus causing § 1681b(3)(D) to read:

> intends to use the information in connection with a determination of the consumer's eligibility for a license, *or*
>
> intends to use the information in connection with a determination of the consumer's eligibility for a[n] other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.

It is the contention of the Respondent that this second interpretation is the Congressional intent and that the Court of Appeals has correctly seen it so. It is a "consumer report" if given to a government instru-

mentality, and thus permissible under FCRA, when transmitted for a license or transmitted for some benefit [e.g. home mortgage, franchise to operate a business on a government reservation to qualify for a Small Business Administration loan] which would require a financial verification. Given this reading of the FCRA, § 1681f, which limits information to government agencies, is now clear and congruent with the rest of the FCRA.

When a consumer (individual) deals with the Government for a license or he negotiates some financial arrangement with a government agency, the government may request a "consumer report" and it may be lawfully provided under the terms of FCRA. However FCRA does not permit the government to invade the files of every reporting agency at the government's whim and caprice, since § 1681f allows:

> Notwithstanding the provisions of § 1681b, a consumer reporting agency may furnish identifying information respecting any consumer, *limited to* his name, address, former addresses, places of employment or former places of employment, to a governmental agency .

The Petitioner/Credit Company must then argue that, since it presented a non-consumer report to a governmental instrumentality, the report is non-covered by the FCRA; therefore the Petitioner/Credit Company may empty its files to any government agency, with absolute impunity and in Pecksniffian disdain of the § 1681f, since § 1681f is non-law concerning a non-report which is non-covered. The Petitioner/Credit Company has questioned the Court of Appeals *sua sponte* determination of what the FCRA *should* say and complains that the Court's interpreta-

tion "departs from the accepted and usual course of judicial proceedings".

Section 1681f has been interpreted to prohibit the government's use of consumer reporting agency files at will.

> The clear implication from this Section [1681f] is that the Act is applicable to *all government agencies*, including the Internal Revenue Service, and to the extent that a government agency seeks a consumer report in the hands of a consumer reporting agency, it must obtain a Court order therefor pursuant Section 1681b of the Act or otherwise comply with such Section. *United States* vs *Puntieri*, 379 F.Supp. 332, 334 (D. N.Y. 1974)

The Petitioner/Credit Company would argue that if the information is not for purposes authorized in § 1681a(d) or § 1681b, there is not "consumer report"; therefore the Act does not apply. This though contravenes plain English, the Senate Committee Report and judicial interpretation.

> There can be little doubt that government agencies in general are held to the provisions of section 604 [1681b]. This is evidenced by section 608 [1681f] of the Act, quoted above, which allows a consumer reporting agency to furnish a governmental agency with identifying information concerning a consumer. But the type and amount of information which may thus be furnished to government agencies notwithstanding section 604 [1681b] makes it clear that section 604 [1681b] was intended to apply to government agencies as well as others seeking consumer reports.
>
> Moreover, the legislative history of Fair Credit Reporting Act indicates that Congress clearly intended that no government agency should receive

a consumer report other than pursuant to the provisions of section 604 [1681b]. The Senate Committee Report on S. 823, as passed by the Senate on November 6 1969, reflects an intent and concern that consumers be secure against unlimited governmental acquisition of personal information about them. The Report explained the interrelationship of section 604 [1681b] and section 608 [1681f] as follows:

> "Section 608 [1681f]—Disclosure to Governmental Agencies—The disclosure of information to governmental agencies is limited to identifying type information . . . unless the governmental agency has obtained a Court order or is a bona fide creditor, insurer, employer or licensor." *F.T.C.* v. *Manager, Retail Credit Co., Miami Branch Office,* 357 F. Supp. 347, 352 (1973).

In the case of *F.T.C.* v. *Manager, Retail Credit Co., supra,* the Petitioner/Credit Company successfully resisted a request for consumer reports by the Federal Trade Commission on the grounds that the Petitioner/Credit Company was not authorized by § 1681b to release consumer reports. (*F.T.C.* v. *Manager, Retail Credit Co., supra.*, at 349) A position then, most inconsistent with the present assertion that such activity is, now, not within the ambit of the FCRA. While asking this Honorable Court to supervise the Court of Appeal's interpretation, the Petitioner simultaneously asks that § 1681f be read to non-exist so there will be non-coverage by FCRA of the non-credit submitted to the Texas Board thus rendering the Petitioner non-required to meet the "grave responsibilities" imposed by FCRA on all credit reporting agencies.

D. In the Syntax of the FCRA, "Consumer" and "Individual" Are Synonymous: It Is the Individual That Congress Intended To Protect.

The Petitioner "strain[s] at a gnat, and a swallow[s] camels" (Matthew 23:24) to classify the report on the Respondent-Plaintiff/Physician as other than a consumer report. The FCRA defines a consumer as an individual at § 1681a(c) and defines a "person" at §1681a(b) more expansively to include inter alia corporations, trusts, associations, and governmental agencies. The FCRA and the learning we receive from subsequent judicial interpretations are consistant in demonstrating the central theme of protection of the individual from the abuses of the credit reporting industry.

> The Fair Credit Reporting Act, 15 USCA 1681 et. seq. (FCRA), enacted in 1970 represents the first significant effort to curb some of the abuses of the credit reporting industry. It is has been estimated that credit files are maintained on more than 120 million American consumers. See Hearings on S. 2360 Before the Subcomm. on Consumer Credit, 93d Cong. 1st Sess. 20. This Act is an effort to provide some protection from erroneous or unauthorized distribution of this mass of information. The margin for error is not small, it being believed that as many as one out of every twenty reports may contain material errors. See "Actions For Negligent Noncompliance Under the Federal Credit Reporting Act," 47 S.Cal.L. Rev. 1070, 1090 (1974). The Act has codified certain aspects of the common law doctrines of defamation and imposed certain new requirements. The general purpose of FCRA is to protect the reputation of a consumer, for once false rumors are circulated, there is not complete vindication. See O. Holmes, The Common Law III (M. Howe

ed. 1963). *Ackerley* vs *Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658, 659 (1974).

The concern of Congress has further pointed out:

> Congress' concern was to protect consumers from the misuse of information acquired by credit reporting agencies. The Act cannot be interpreted as applicable to the activities of credit reporting agencies only when the consumer applies for credit, insurance or employment, leaving them otherwise to continue the very practices the Act was designed to prohibit. The Act would afford little protection for the privacy of a consumer if it only regulated credit reporting agencies of their legitimate business activities but left them free to continue their clandestine activities in other areas.
>
> If a consumer report is only a report made for one of the purposes enumerated in § 1681a(d), then § 1681b(3), restricting the uses to which a consumer report may be put, adds nothing to the Act. In order for § 1681b(3) to be meaningful, "consumer report" must be interpreted to mean any report made by a credit reporting agency of information *that could be used* for one of the purposes enumerated in § 1681a. Only then can § 1681b be given the meaning Congress intended. Section 1681b states the purposes for which such reports legitimately may be used. Its clear implication is that there are some purposes for which consumer reports may not be furnished. *Belshaw* vs *Credit Bureau of Prescott,* 392 F. Supp. 1356, 1359 (1975).

CONCLUSION

The Honorable Fourth Circuit Court of Appeals correctly determined the spirit and intent of the FCRA, its decision being congruent with the decisions of other Courts in the federal system and not requiring the supervision of the Supreme Court of the United States in this case, and the Petition for a Writ of Certiorari should be denied.

Dated: December 29, 1975

Respectfully submitted,

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